

Message

From: Madigan, Andrea [Madigan.Andrea@epa.gov]
Sent: 12/11/2018 7:07:33 PM
To: Benevento, Douglas [benevento.douglas@epa.gov]
CC: Smidinger, Betsy [Smidinger.Betsy@epa.gov]; Bohan, Suzanne [bohan.suzanne@epa.gov]
Subject: FW: Colorado's EC statute
Attachments: ARARs 101 Slides for R8 Training Part 1_4-24-2018.pptx; ARARs Slides for R8 Part II_4-24-2018 DMB.pptx; Best Practices - ARARs.pdf

<https://www.epa.gov/superfund/applicable-or-relevant-and-appropriate-requirements-arars>

Hi Doug. Below is the email requesting information from CDPHE on the implementation of Colorado's environmental covenant statute. Also attached are some background materials on ARARs in general. We hosted a training with Colorado last April and these are the slides from that training. Also attached is the memo from HQ on working with states on the identification of ARARs and a link to EPA's webpage on ARARs.

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From: Madigan, Andrea
Sent: Tuesday, December 11, 2018 7:43 AM
To: 'Jason King' <Jason.King@coag.gov>
Cc: Naftz, Douglas <Naftz.Douglas@epa.gov>
Subject: Colorado's EC statute

Hi Jason. Doug Jamison suggested that EPA submit to you our questions regarding Colorado's environmental covenant statute (EC statute). As I mentioned, we want to better understand CDPHE's interpretation of the statute and its views on how it should be implemented at a CERCLA site when the property owner refused to execute the EC. This did not come up at Standard Mine as we had a consent decree and full cooperation with the property owner PRP. Here are the questions:

1. If a property owner refuses to execute an EC and the municipal ordinance approach is not feasible, is it CDPHE's position that EPA should as a matter of practice issue an order to the property owner to execute the EC? Are there other options under the statute other than the filing of a unilateral notice?
2. The EC statute provides for the unilateral filing of a restrictive notice if the property owner is subject to an order for "remediation". I think you maintain that an order from EPA to execute an EC would constitute a remediation order under the Colorado statute. I have heard a contrary opinion expressed by the AG's office in the past – the view expressed was that the order had to be for cleanup. Is there any legislative history or case law on this issue that could provide more certainty?

3. Under what circumstances has CDPHE issued remediation orders and unilaterally filed restrictive notices? Have there been any challenges to unilateral filings at non-CERCLA sites?
4. You mentioned yesterday the idea that a waiver could be invoked if implementation of the statute was not feasible on every property. Were you thinking about a waiver under CERCLA or the EC statute? I assumed you were referring to CERCLA but did not consider a waiver under the EC statute. Under what circumstance would a waiver be invoked under the EC statute? Under what circumstances has CDPHE invoked a waiver of the statute in the past?
5. If an EC is recorded and a trespasser were to damage an environment response structure, would the property owner be responsible for fixing the damage – is there a strict liability component to the statute? How has this been addressed at non-CERCLA sites?
6. Have there been any legal challenges to the statute with regard to the distinction between a property interest and the exercise of police and regulatory authority?

Could we get together to discuss? Thanks.

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